

DATE: May 5, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-27170

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

#### FOR APPLICANT

Kenneth M. Roberts, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 18, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), Guideline D (Sexual Behavior), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 2, 2005, after the hearing, Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's conclusion that Applicant's falsifications of a Security Clearance Application (SCA) were mitigated was unsupported by the record evidence and whether the Judge's favorable security clearance decision was arbitrary, capricious, and contrary to law because it is based on a piecemeal analysis of the record evidence. We reverse the Administrative Judge's decision to grant the clearance.

### **I. Whether the Record Supports the Administrative Judge's Factual Findings**

#### **A. Facts**

The Administrative Judge found the following:

The Applicant was granted a security clearance by the Air Force in 1980. Subsequent to being granted a clearance, he used marijuana, amphetamines and cocaine. The Applicant used marijuana once or twice a week from 1971 until about 1981. He used amphetamines once in 1990.

The Applicant used cocaine with varying frequency from about 1972 to 1984, and from about August 2001 to May 2003. In 1984 he was arrested and subsequently found guilty of Possession of a Narcotic Controlled Substance, cocaine. The Applicant entered a drug diversion program and the charge was subsequently dismissed upon the program's completion. In September 1989, Applicant was also arrested for resisting arrest.

The Applicant consumed alcohol, at time to excess and to the point of intoxication from 1972 until May of 2003. He

was a binge drinker, whose drink of choice was beer.

The Applicant engaged in two sexual episodes outside his marriage, the most recent episode occurring in 2001. Applicant's wife is unaware of any of those episodes and his counselor has advised him not to disclose them to her. Applicant cannot be blackmailed about those transgressions because he has disclosed them to his supervisor and would inform his wife about them if he were threatened or coerced as a result of them.

In May 2003, the Applicant tested positive for cocaine and was removed from a position as a part-time pilot with a commercial airline. In June of 2003, he entered an inpatient treatment program, followed by outpatient treatment from July to October of 2003, and treatment from a licensed marriage family counselor. The Applicant was diagnosed as suffering from alcohol dependence and cocaine dependence. He successfully completed the treatment programs and was reinstated as a commercial pilot in May of 2004. The Applicant has not used any controlled substance since May 10, 2003 and does not intend to use drugs in the future. He last consumed alcohol on May 17, 2003, has an Alcoholics Anonymous (AA) sponsor, and attends AA meetings on a regular basis. In ay of 2005, Applicant received a favorable long-term prognosis from a "Senior Aviation Medical Examiner (AME) for the Federal Aviation Administration."

In answers to questions 27 and 28 on his November 2001 Security Clearance Application (SCA), the Applicant failed to disclose any of his past drug involvement. That lack of candor was a violation of 18 U.S.C. §1001. In answer to question 6 on his November 2001 SCA, the Applicant failed to disclose his part-time employment as a commercial airline pilot. The Applicant testified credibly that this was due to "oversight" on his part. The Applicant disclosed his 1984 drug arrest in response to question 24 of his November 2001 SCA and voluntarily disclosed all of his past drug involvement in a sworn statement executed in October 2003. He also disclosed his past drug involvement in answer to questions 27 and 28 on a March 2005 SCA.

## B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent necessary to resolve the issues raised on appeal, the Judge's findings of fact will be discussed below in conjunction with the analysis of his ultimate conclusions.

### **Whether the Record Supports the Administrative Judge's Ultimate Conclusions.**

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel contends that the Administrative Judge's favorable security clearance decision is arbitrary, capricious, and contrary to law, and unsupported by the weight of the record evidence in its ultimate conclusion that the Guideline E concerns (i.e., falsification) were mitigated by Guideline E itigating Condition 2. [\(1\)](#) In support of that contention, Department Counsel argues that the Judge erred by: (1) accepting at face value Applicant's testimony that he

voluntarily provided information about his drug use to investigators before being confronted with the fact of his drug use, and (2) applying Guideline E Mitigating Condition 2 in Applicant's favor when it does not apply to the facts and circumstances of this case as a matter of law, and Applicant's disclosures cannot be deemed "recent." Department Counsel's argument has merit.

The only record evidence supporting the Administrative Judge's conclusion that Applicant's disclosure of his past drug use was voluntary was Applicant's brief testimony at the hearing.<sup>(2)</sup> The Judge previously concluded that Applicant falsified a November 2001 security clearance application by responding "no" to two questions about drug use. Given this history of lack of candor on the part of Applicant, the Judge failed to articulate a rational explanation for his unqualified acceptance of Applicant's brief, uncorroborated, and ambiguous statement at the hearing concerning the voluntariness of his disclosure. Applicant bears the burden of proof to establish matters in mitigation. Given the state of the record in this case, it was arbitrary and capricious for the Judge to conclude that Applicant had satisfied his burden of establishing mitigation on this point.

Guideline E Mitigating Condition 2 is properly used in a case where the falsification is old and the applicant subsequently provides correct information to the government about other matters not covered by the old falsification. (To elaborate, in a hypothetical case, if an applicant made a false declaration in 1986 but subsequently provided truthful statements about matters other than the false declaration in his re-investigations in 1992 and 1999 and did not repeat the false declaration, then Mitigating Condition 2 would be applicable.) In a situation where an applicant seeks to correct a falsification, such as the instant case, the potentially applicable factor, if there is one, would be Guideline E Mitigating Condition 3,<sup>(3)</sup> not Guideline E Mitigating Condition 2. *See* ISCR Case No. 99-0557 at 4 (App. Bd. Jul. 10, 2000).

Additionally, it is untenable to maintain on this record that Applicant's falsification was not recent. The delay between the falsification and his belated disclosures to the investigators can be charged to Applicant's falsification itself. It is unreasonable to give Applicant credit for the time it took the government to find out he lied. Finally, given the record of the case, it would be untenable to conclude that the statement given by the Applicant some two years after the falsifications constituted a prompt, good-faith effort to correct the falsifications before being confronted with the facts sufficient to warrant application of Guideline E Mitigating Condition 3.

Department Counsel contends the Administrative Judge erred by analyzing the various incidents in Applicant's history of substance abuse, dishonesty and misconduct in a piecemeal manner. Department Counsel asserts that it was arbitrary and capricious for the Judge to view the drug abuse, alcohol abuse, falsification and other criminal conduct in isolation and without regard to the evidence as a whole. Department Counsel's contention has merit.

The record evidence shows that Applicant has a lengthy history of misconduct that includes drug and alcohol abuse, criminal conduct (resisting arrest), and falsifications. A review of the Administrative Judge's decision reveals that he addressed each category of Applicant's misconduct separately and considered the application of various mitigating factors separately without reference to the totality of Applicant's circumstances or the record as a whole. The Judge's analysis of the numerous acts of misconduct in this record failed to reflect a reasonable interpretation of the record evidence as a whole. By analyzing each category of incidents separately, the Judge failed to consider the significance of Applicant's pattern of conduct. *See, e.g., Raffone v. Adams*, 468 F.2d 860, 866 (2d Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). In this case, where there is evidence of repeated multiple substance abuse spanning more than thirty years, along with serious recent misconduct in the form of providing false answers on an official government form in the course of an official government investigation, the totality of Applicant's record is important.

Under the whole person concept, an Administrative judge must consider the totality of Applicant's conduct when deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See, e.g., ISCR Case No. 98-0350* at 3 (App. Bd. Mar. 31, 1999). The Judge's piecemeal analysis of Applicant's overall conduct did not satisfy the requirements of ¶ E2.2.1 of the Directive.

There is record evidence of mitigation in this case in the form of reform and rehabilitation. However, Applicant's evidence of reform and rehabilitation (as it applies to his substance abuse) is relatively recent and brief in duration compared to his history of abuse. Considering the record as a whole, the Judge gave undue weight to Applicant's

evidence of reform and rehabilitation relating to his substance abuse. The Judge also considered reform and rehabilitation separately for each category of abuse or misconduct, without reference to the record evidence as a whole. Additionally, regarding the mitigation of Applicant's criminal conduct, which includes falsification, Department Counsel asserts that it was erroneous for the Judge to apply Guideline J Mitigating Conditions 1<sup>(4)</sup> and 6<sup>(5)</sup> in this case. While Department Counsel fails to establish that the Judge erred in applying Mitigating Condition 1, the application of that mitigating condition in and of itself is insufficient to support the Judge's favorable conclusions under Guideline J or the case as a whole, given the totality of the circumstances established by the evidence. The presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case. Rather, the application of a disqualifying condition or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Regarding Mitigating Condition 6, Department Counsel correctly points out that, while Applicant offered some evidence of rehabilitation, given the record as a whole, that evidence was insufficient to rise to the level of "clear evidence of rehabilitation" required under Mitigating Condition 6. The Judge's application of that mitigating factor was contrary to the weight of the evidence in the case.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, the Judge's favorable clearance decision is not sustainable, and the identified errors are unlikely to be remedied by remand. Therefore, the decision must be reversed.

### Order

The Administrative Judge's decision is REVERSED.

Signed : Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Directive ¶ E2.A5.1.3.2.

2. In response to the Judge's question, "Did you spontaneously come forward with the information or did he have to drag it out?", Applicant replied, "No, I came forward with it." (Hearing Transcript at p. 89).

3. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

Directive ¶ E2.A5.1.3.3.

4. "The criminal behavior was not recent."

5. "There is clear evidence of successful rehabilitation."